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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on December 8, 1955, setting aside an unfair labor practice order issued by the Board against respondent Union.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 16-26) is not yet reported. The decision

and order of the Board (J.A. 15a-22a)[1] are reported at 110 NLRB 2192.

JURISDICTION

The judgment of the court below (Appendix A, *infra*, pp. 27-28) was entered on December 8, 1955. On February 27, 1956, by order of Mr. Chief Justice Warren, the time for applying for a writ of certiorari was extended to March 24, 1956 (*infra*, p. 28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and under Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 147, 29 U.S.C. 160(e), hereafter called the Act).

QUESTION PRESENTED

Whether the Board may properly conclude that, where the employer involved in the primary labor dispute may be effectively picketed at his separate place of business, the extension of the picket line to other work sites, where the primary employer and neutral employers also work, violates Section 8(b)(4)(A) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B, *infra*, p. 29.

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[1] The reference "J.A." designates the portion of the record printed as a joint appendix to the briefs of the parties in the court below.

STATEMENT

A. *The Board decision*

Campbell Coal Co. has two ready-mix concrete plants in Atlanta, Georgia, from which its truck drivers pick up the concrete and deliver it to construction sites in the area (J.A. 17a; 10a).[2] These drivers enter and leave the ready-mix plants several times daily, spending about a quarter of their working time at the plants. They spend a like amount of time en route to and from the construction sites, and the remaining half of their working time at the construction sites themselves. At these sites the truck drivers, following directions by the contractors, unload the ready-mix from the truck into designated receptacles and building forms.(J.A. 18a; 10a).

On June 9, 1954, in protest against Campbell's discharge of a number of ready-mix truck drivers, respondent Union called a strike of Campbell's employees. It also began, and continued to picket Campbell's two ready-mix plants throughout the period relevant herein (J.A. 18a; 9a).

In addition to picketing Campbell's plants, union pickets followed Campbell trucks from the

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[2] The facts are stipulated. The parties waived a hearing and issuance of proposed findings by a Trial Examiner and submitted the case directly to the Board for decision (J.A. 16a).

On August 16, 1954, the United States District Court for the Northern District of Georgia issued an injunction under Section 10(l) of the Act, barring respondent Union from engaging in the construction project picketing hereafter described, pending final determination of the issue by the Board. *Getreu* v. *Sales Drivers, etc.*, 34 LRRM 2750.

ready-mix plants to various construction projects where delivery of the company's product was to be made (J.A. 25; 17). At these sites, the Union agent advised the contractor or his representative of the dispute with Campbell and asked him not to accept delivery of the concrete.[3] If delivery was refused, the Union took no further action, but, where delivery of the Campbell ready-mix was accepted, Union agents picketed the immediate area of the truck with signs which read:

> Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL.

The picketing continued only so long as Campbell's trucks remained on the construction site. (J.A. 18a; 10a-11a.)

In some instances, employees of the contractors working on the construction project quit work for the duration of the picketing. It was stipulated that the reason assigned by the employees for such work stoppages was the presence of the Union's picket sign. The Union agents did not inform the employees who quit work, or other employees working on the picketed projects, that the picketing

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[3] The Union had no dispute with any of the contractors on these projects (J.A. 3a, 9a). They consisted of the following firms: George A. Fuller Construction Company, Southeastern Construction Company, The Flagler Company, Inc., Barge-Thompson Company, Ira H. Hardin Company, Wesley & Company, Inc., and Thompson & Street Company (J.A. 2a-3a, 12a).

was not intended as an appeal to them not to work. (J.A. 11a.)

On the basis of the foregoing facts, the Board concluded that the picketing at the construction projects induced employees of the neutral employers thereon to quit work, with an object of forcing these employers to cease doing business with Campbell, and that the picketing was violative of Section 8(b)(4)(A) of the Act (J.A 19a). The Board viewed this case as coming within the scope of its ruling in *Washington Coca Cola Bottling Works, Inc.*, 107 NLRB 299, *enforced sub nom., Brewery and Beverage Drivers* v. *National Labor Relations Board*, 220 F. 2d 380 (C.A.D.C.), where it had held that picketing at places where both the primary employees and neutral employees were at work was violative of Section 8(b)(4)(A), if the primary employer could effectively be picketed at his own separate premises in the area.

The Board ordered the Union to cease and desist from the unfair labor practices found and to post appropriate notices (J.A. 20a-22a).

B. *The decision of the court below*

The Court of Appeals set aside the Board's order and remanded the case to the Board "for its further consideration, if desired" (Appendix A, p. 26). The court, reading the Board's decision as resting on "a rigid rule that when [a] separate situs is available picketing at a common situs is prohibited" (*id.*, p. 20), rejected this view, for the reason that (*id.*, pp. 22-23):

> Section 8(b)(4) does not contain a provision which condemns concerted activity of employees with respect to their own employer merely because it appears at a place where it comes to the attention of and incidentally affects employees of another, even where the activity could be carried on at a place where the primary employer alone does business. The existence of a common site, of such incidental effect, and of another place which can be picketed, are factors to be considered in determining whether or not the section has been violated, but alone are not conclusive. The presence of these factors does not warrant a failure to consider other facts which are relevant and perhaps countervailing. See *National Labor Relations Board* v. *General Drivers, Warehousemen and Helpers, Local 968*, 225 F. 2d at 209-210. No rigid rule which would make these few factors conclusive is contained in or deducible from the statute. To read it into the statute by implication would unduly invade the application of section 13 * * *. [Footnotes omitted.] [4]

REASONS FOR GRANTING THE WRIT

The question here, *viz.*, whether the Board may properly conclude that, where the primary em-

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[4] The court pointed out that its earlier affirmance of the Board's order in the *Washington Coca Cola* case, p. 5, *supra*, did not constitute approval of such a rule, "but must be construed only as agreement with the conclusion the Board there reached, which rested in considerable part upon additional findings" (Appendix A, p. 22).

ployer involved in a labor dispute may be effectively picketed at his separate place of business, the union violates Section 8(b)(4)(A) of the Act when it fails to confine its picketing to those premises but extends it to a common site where both the primary employees and neutral employees are also engaged in work, was the subject of an earlier petition for certiorari which this Court denied. *National Labor Relations Board* v. *General Drivers, Warehousemen and Helpers, Local 968*, No. 476, October Term, 1955, certiorari denied, 350 U.S. 914, December 5, 1955. However, in *General Drivers*, unlike here, the primary employer, Otis Massey, had two sets of employees, truck drivers and construction workers. The union's dispute involved the truck drivers, who picked up materials at Otis Massey's warehouse and delivered them to various construction projects; Otis Massey's construction workers, on the other hand, rarely came to the warehouse. See Board's Petition for Certiorari in No. 476 at p. 5. Accordingly, the question of whether a primary employer may lawfully be picketed at a common project when he can be effectively picketed at his own separate premises in the area was not necessarily reached in *General Drivers* since, in the Court of Appeals' view (225 F. 2d at 208, 210), the union was entitled to appeal to the Massey construction workers as well as to its truck drivers, and the construction workers could not be effectively appealed to at their employer's separate premises (see n. 15, *infra*).

In this case, however, there is only one set of primary employees who work both at the primary employer's separate premises and at the common project. In these circumstances, and in view of the further considerations set forth below and the fact that related problems respecting the interpretation of Section 8(b)(4)(A) are now pending before this Court in two other cases,[5] the Board feels warranted in again presenting the question to this Court.

1. The problem is an important and recurring one in the administration of the Act, affecting not only the construction industry but all industries where the employees involved in the primary dispute transport products from the primary employer's premises to those of neutral employers. Moreover, it is a problem which was left unresolved by this Court's decisions in *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665; *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694.[6] The *Rice Milling* case merely involved a picket line at the primary employer's separate premises; in the other two cases, the picketing, al-

[5] *National Labor Relations Board* v. *Business Machine and Office Appliance Mechanics Conference Board*, No. 711, this Term; *Associated Musicians* v. *National Labor Relations Board*, No. 635, this Term.

[6] *United Brotherhood of Carpenters and Joiners of America* v. *National Labor Relations Board*, 341 U.S. 707, the fourth case in this group, did not involve picketing but a direct request to secondary employees to strike.

though it occurred at the common project, was clearly aimed at neutral employers.[7] Thus, there was no occasion in any of these cases to consider whether Section 8(b)(4)(A) of the Act bars common project picketing even when it is ostensibly aimed at the primary employer whose employees are at work there, if the separate premises of the primary employer provide adequate opportunity to picket that employer.

2. The conclusion of the court below rests, we think, on the erroneous premise that, since "Section 8(b)(4) does not contain a provision which condemns concerted activity of employees with respect to their own employer merely because it occurs at a place where it * * * affects employees of another" (Appendix A, p. 22), there is no statutory basis for invalidating picketing of the primary employer when it extends beyond the primary employer's separate premises. This omission is inconclusive for, even without a special provision, the literal language of Section 8(b)(4)(A) would interdict virtually all picketing, including picketing of the primary employer. The Section must be read in the light of "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and

[7] The picket signs did not name the primary employer but characterized the entire job as unfair; the picketing in *Denver* was preceded by an arrangement between the union and the secondary employees that it would constitute a signal for them to strike; the picketing in *Electrical Workers* occurred while no primary employees were on the common project (341 U.S. at 678-679, 697).

of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 692. The Board's separate premises test is but a means of administering the provision so as to accommodate those dual objectives.

In short, the terms of Section 8(b)(4)(A) prohibit the inducement of secondary employees to stop work, where an object is to exert pressure on their employers to cease doing business with the primary employer. Even a traditional picket line at the primary employer's own plant has an impact on the employees of neutral employers, and may be said to have, as one of its objects, the cessation of business relations between these employers and the primary employer.[8] When the picketing of the primary employer occurs at places where the primary employees work along with other employees, existence of the means and objective interdicted by Section 8(b)(4)(A) is even plainer. For the "reluctance of workers to cross a picket line is notorious" (*Printing Specialties & Paper Converters Union* v. *LeBaron*, 171 F. 2d 331, 334 (C.A. 9)), and, if they refuse to cross, the only way that their employers can extricate them-

[8] *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. at 670. See also *Schultz Refrigerated Service*, 87 NLRB 502, 505: "Plainly, the object of all picketing at all times is to influence third persons to withhold their business or services from the struck employer. In this respect there is no distinction between lawful primary picketing and unlawful secondary picketing proscribed by Section 8(b)(4)(A)."

selves is by ceasing business with the primary employer.[9] Indeed, the picketing at the construction projects here confirms this, for the picket signs, though ostensibly addressed to the primary employer and his employees, caused neutral employees to walk off the job, and the picket line was imposed only when the neutral contractor refused to discontinue handling Campbell's ready-mix concrete[10] (p. 4, *supra*).

However, to read Section 8(b)(4)(A) as barring even a picket line at the primary employer's plant would leave no room for legitimate primary activity, protected by Sections 7 and 13 of the Act. An accommodation between these Sections and Section 8(b)(4)(A) is therefore required, which privileges inducement of secondary employees resulting from the picketing at the primary employer's plant, notwithstanding Section 8(b)(4)(A), on the ground that it is merely "incidental" to lawful primary activity.[11]

Similarly, to regard all picketing at a common project as interdicted by Section 8(b)(4)(A)

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[9] See *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 688; *Piezonki d/b/a Stover Steel Service* v. *National Labor Relations Board*, 219 F. 2d 879, 881 (C.A. 4).

[10] See *National Labor Relations Board* v. *Local Union No. 55*, 218 F. 2d 226, 231 (C.A. 10); *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900, 904 (C.A. 2), certiorari applied for, No. 635, October Term, 1955.

[11] *The Pure Oil Co.*, 84 NLRB 315; *Ryan Construction Corp.*, 85 NLRB 417; *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665; *DiGiorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642, 649 (C.A.D.C.), certiorari denied, 342 U.S. 869.

would, in cases where the primary employees spent most or all of their working time there, provide no room for primary picketing activity in industries where employees work in this fashion. This, too, calls for an accommodation between the competing and conflicting legislative aims. The balance struck by the Board is to permit picketing of the primary employer at points where his employees work with other employees only when the separate premises of the primary employer afford no adequate opportunity for effective picketing of the primary employer. Where this condition exists, [12] and provided that the union has made every reasonable effort to confine its picketing at the common project to the primary employer,[13] such picketing is not regarded as "unlawful because employees of the secondary employers, or employees of other employers, due to their habitual unwillingness to cross picket lines, refused to do so, for such effects are within the realm of the 'incidental' " (*National Labor Relations Board* v. *Service Trade Chauffeurs,* 191 F. 2d 65, 68 (C.A. 2)). On

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[12] See *Schultz Refrigerated Service,* 87 NLRB 502, 503, 507, n. 13; *Moore Drydock Co.,* 92 NLRB 547, 549, n. 6; *Pittsburgh Plate Glass Co.,* 110 NLRB 455, 457.

[13] That is, as the Board stated in *Moore Dry Dock Co.,* 92 NLRB 547, 549:

> (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer [footnotes omitted].

the other hand, where the primary employer may be effectively picketed at his own separate premises, picketing at the common project is not privileged, and the impact of such picketing on secondary employers and their employees would not be exempted from the otherwise applicable ban of Section 8(b)(4)(A).[14]

The considerations supporting this accommodation are that, where the primary employees are accessible at their employer's separate premises, confining the picketing to that place enables the union to exert primary pressure while at the same time holding to a minimum the risk of implicating neutral employers. In these circumstances, the only basis for allowing the picketing to be extended to other work sites of the primary employer is to increase the effectiveness of the picketing by reaching the employees of neutral employers, the very thing which Section 8(b)(4)(A) seeks to avoid. A legitimate basis for increasing the risk of implicating neutrals is afforded only in the situation where, because the primary employer's premises afford no opportunity for effective picketing, common project picketing is necessary to avoid a total obliteration of the union's right to engage in primary activity. Since these considerations are not "wide of any reasonable mark" (*Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 611), the resultant accommodation made by the Board is entitled to stand.

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[14] See *Washington Coca Cola Bottling Works, Inc.*, 107 NLRB 299, enforced, 220 F. 2d 380 (C.A.D.C.).

3. The decision of the court below is in conflict with *National Labor Relations Board* v. *Truck Drivers & Helpers Local No. 728*, 228 F. 2d 791 (C.A. 5, January 7, 1956). In that case, as here, the union could effectively picket National, the primary employer at its separate plant. It nevertheless extended the picketing to the premises of Ford where National's employees picked up trucks for transport to National's plant. The Board held that the picketing at Ford's premises, although ostensibly directed at National, tended to induce Ford's employees to stop work and thereby force a cessation of business relations between Ford and National, and that, since National could be effectively reached at its own plant, the picketing was violative of Section 8(b)(4)(A) (111 NLRB 483, 487). The Fifth Circuit sustained the Board, accepting, unlike the court below, the Board's basic premise that the picketing of the primary employer at the common project was not privileged because "it was clearly not necessary for respondent Union to picket at Ford's premises in order to reach National's employees for *all* of National employees not only could but they were in fact notified of the labor dispute by the picketing at National's terminal on South Street" (228 F. 2d at 796).[15]

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[15] In this respect moreover, the court distinguished its earlier decision in *General Drivers* (p. 7, *supra*), pointing out that in that case "the union was permitted merely to picket the common premise in order to reach *other* employees of the primary employer, who, as we especially noted, almost never came to the primary employer's principal situs, the warehouse" (228 F. 2d at 796).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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MARCH 1956.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12605

SALES DRIVERS, HELPERS & BUILDING COUSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board

Decided December 8, 1955

Before PRETTYMAN, BAZELON and FAHY, Circuit Judges.

FAHY, *Circuit Judge:* On findings of fact based upon a stipulation among the appellant Union, the General Counsel of the National Labor Relations Board, and the Associated General Contractors of America, Inc., Georgia Branch, the Board entered an order against the Union requiring it to cease and desist conduct found to violate section 8(b)(4)(A) of the Taft-Hartley Act, the so-called secondary boycott provision.[1] The Union petitions

[1] This section provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

us to set aside the order and the Board petitions us to enforce it.

The case involves picketing at sites shared by the struck employer and neutral employers. The pertinent findings of fact contained in the Board's decision are in substance as follows: Campbell Coal Company is engaged in the sale of building materials including ready-mixed concrete. It operates two ready-mix concrete plants in Atlanta, where it employs, among others, men who drive trucks by which Campbell delivers its ready-mix to construction sites. At the delivery points the truck drivers at the direction of the contractors on those sites operate the unloading mechanism of the truck so as to place the ready-mix at places and in receptacles designated and provided by the contractors. Frequently the unloading is accomplished by pouring the mixture into forms so placed that when dry the mixture becomes part of the structure on the project. The drivers spend approximately 25 per cent of their working time at their employer's plants, 25 per cent en route, and 50 per cent at construction sites.

The Union initiated a strike against Cambell be-

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. * * *" 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4)(A) (1952).

cause of the discharge of a number of the truck drivers. It picketed the two ready-mix plants. In addition the pickets followed some of the trucks from the plants to various construction projects where the trucks made deliveries, although the Union had no dispute with any of the contractors on such projects. It is this latter picketing which the Board found to be illegal. The pickets carried signs which read as follows:

> "Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL."

The picketing continued so long as Campbell's trucks remained on the construction site and was confined to the immediate area of the trucks or as close as the pickets could get without trespassing on private property. Except for displaying the picket signs, the Union's pickets did not communicate with any employees working at the projects.

On these findings [2] the Board reached the conclu-

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[2] Some additional facts are contained in the stipulation but are not the subject of findings by the Board. No contention in this court is made by the Board upon the basis of these facts, although some of them are enumerated in its brief. These are that at each construction site the Union agent advised the contractor or his representative of the dispute with Campbell and asked him not to accept delivery of the concrete. If delivery was refused the Union took no further action, but if accepted the Union agents picketed the immediate area of the trucks with the signs already described. The picketing continued while Campbell's trucks remained on the construction site. In some instances employees of the contractors working on the construction projects quit work for the duration of the picketing, assigning as the reason therefor the presence of the picket signs. The Union agents did not inform employees

sion that section 8(b)(4)(A) was violated because the picketing was conducted "to force secondary employers located on such [construction] projects to cease doing business with Campbell, by inducing and encouraging the employees of said employers to engage in a strike * * *."

In so ruling the Board said it relied upon "the reasons stated in *Washington Coca-Cola*, 107 NLRB No. 104 [p. 299], affirmed in *Thurston Motor Lines, Inc.*, 110 NLRB No. 122 [p. 748] * * *." It considered without merit the Union's defense that its picketing of the construction projects was within the area of permissible conduct recognized by the Board in *Moore Dry Dock Company*, 92 N.L.R.B. 547. In that case the Board laid down certain conditions which a union must meet in order for its picketing to be lawful where the site picketed is shared by the primary employer and neutral employers. These conditions are that the picketing disclose clearly that the dispute is with the primary employer only, that the picketing is limited to times when the dispute situs is on the neutral employer's premises, that the primary employer is engaged in its normal business at the common situs when the picketing takes place, and that the picketing is confined to areas reasonably close to the situs of the dispute. The Union here contends that it has met these conditions but that

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who quit or other employees on the projects that the picketing was not intended as an appeal to them not to work, but pickets did not speak to or communicate with any employees on the projects other than by displaying the picket signs, or in any manner threaten, coerce, or intimidate the employees to quit work or offer any other form of inducement or encouragement so to do.

the Board has added another and absolute prerequisite that no situs for effective picketing other than the common one be available. While in *Moore Dry Dock* it was a fact that no such separate situs was available, the Board decision did not specify this as one of the conditions for lawful picketing at a common situs. We agree with the Union that in the case at bar the Board has added this condition and has applied a rigid rule that when another such separate situs is available picketing at a common situs is prohibited. This is borne out by the findings relied upon by the Board, above set forth, by its brief in support of its decision, and by the reasoning of the decision itself. As to the latter, the *Thurston* case is expressly relied upon. There the Board held that picketing at a common situs was unlawful "when the employer has a primary place of business in the locality which can be picketed by the labor organization with which the employer has a dispute." 110 N.L.R.B. at 754. Since there was such a separate situs it was concluded that the picketing at the situs which was common to the struck employer and the secondary employer was not primary, but was "an attempt to induce and encourage the employees of various secondary employers to engage in a strike or a concerted refusal in the course of their employment to handle or work on Thurston's goods or perform services involving Thurston's goods, an object thereof being to require such secondary employers to cease doing business with Thurston."[3] *Ibid.*

[3] Although these statements are taken from the trial examiner's findings of fact, they must be regarded as proper expressions of the rule upon which the Board depends in the instant case. In the first place, the Board in *Thurston* adopted these

In *Washington Coca-Cola, supra,* decided before *Thurston,* and now also relied upon, the Board answered a union's contention that certain picketing was protected by the *Moore Dry Dock* rule by holding the rule inapplicable whenever the struck employer has a permanent place of business at which picketing can be effectively carried on.

Finally, we consider the Board's brief. It states:

> "Accordingly, the question is not * * * whether 'the dispute reaches to the area which is being picketed,' but whether Campbell, the primary employer, had separate premises in the area which provided the Union with a fixed and adequate base for carrying on its primary activity. The record shows that, like the Company in *Coca-Cola, supra,* it did have such premises. * * * In these circumstances the Board's common situs rules are inapplicable, there being no excuse, other than the impermissible one of increasing the effectiveness of the picketing, for allowing the Union to extend

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findings. And in the second place, any other conclusion would rob of meaning the Board's reliance in the instant case upon "the reasons * * * affirmed in *Thurston Motor Lines, Inc.* * * *" since the Board gave no independent expression of reasons for the *Thurston* decision. It is true that the examiner assigned an alternative reason in *Thurston,* namely, that another *Moore Dry Dock* requirement was absent inasmuch as the picketing did not clearly disclose that the dispute was with the primary employer only. But the Board could not have intended to refer to this reason as applicable to the instant case, since here the picket signs were clear and there were no attempts by those picketing to induce employees of neutral employers not to cross the picket line, as there were in *Thurston.* Moreover, the Board's brief, discussed in the text *infra,* demonstrates beyond doubt that the rule relied upon is the one above outlined.

it to the construction projects and thereby involve neutral employers in its dispute with Campbell."

Affirmance by this court of the *Coca-Cola* order, *sub nom. Brewery and Beverage Drivers and Workers Local Union No. 67* v. *NLRB*,——U.S. App. D.C. ——, 220 F. 2d 380, did not constitute approval of the rule now advanced by the Board, but must be construed only as agreement with the conclusion the Board there reached, which rested in considerable part upon additional findings. Here, in contrast, the decision rests solely upon the fact that Campbell had other places of business, not common with a neutral employer, which could be and were being picketed.[4] Yet Campbell's employees worked at these places only about 25 per cent of their time and spent 50 per cent with the trucks at places where Campbell did business coincidently with neutral employers. Section 8(b)(4)(A) does not contain a provision which condemns concerted activity of employees with respect to their own employer merely because it occurs at a place where it comes to the attention of and incidentally affects employees of another, even where the activity could be carried on at a place where the primary employer alone does business. The exist-

[4] These were not the only factors considered by the Board in its decision recently upheld in *NLRB* v. *Associated Musicians of Greater New York, Local 802*, No. 23550, 2d Cir., Nov. 3, 1955. In that case requests were made by Union representatives that the secondary employers cease doing business with the primary employer. This was true in the present case, but was not relied upon by the Board. See note 2 *supra*. There are also other factual distinctions between the two cases.

ence of a common site, of such incidental effect, and of another place which can be picketed, are factors to be considered in determining whether or not the section has been violated, but alone are not conclusive.[5] The presence of these factors does not warrant a failure to consider other facts which are relevant and perhaps countervailing. See *NLRB* v. *General Drivers, Warehousemen and Helpers, Local 968*, 225 F. 2d at 209-210. No rigid rule which would make these few factors conclusive is contained in or deducible from the statute. To read it into the statute by implication would unduly invade the application of section 13[6] which preserves the right to strike "except as specifically provided" in other provisions of the Act. It is not specifically provided that picketing at a common site, with an incidental effect upon employees of a neutral employer, is unlawful in every case where picketing could also be conducted against the primary employer at another of its places of business.

This view has been set forth at length in *NLRB* v. *General Drivers, Warehousemen and Helpers, Local 968*, 225 F. 2d 205 (5th Cir.). There the labor dispute involved four warehouse employees who occasionally made deliveries to construction sites where the remainder of the employer's work force was engaged. Employees of neutral employers were also working at these sites, but not at

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[5] In addition to *Moore Dry Dock*, *supra*, see *Schultz Refrigerated Service*, 87 N.L.R.B. 502; *Oil Workers International Union (The Pure Oil Co.)*, 84 N.L.R.B. 315; *NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65 (2d Cir.); *NLRB* v. *Local Union No. 55*, 218 F. 2d 226 (10th Cir.).

[6] 61 Stat. 151 (1947), 29 U.S.C. § 163 (1952).

the primary employer's warehouse. Nevertheless, these common sites were picketed along with the warehouse, regardless of whether any of the four employees made deliveries to the construction projects. The picket signs together with pamphlets distributed by the pickets showed that the strike was against only the primary and no other employer, and that the picket line should be considered as directed only towards those locations within the projects where primary employees were working. The court held the Board erred in concluding that the Union was in violation of section 8(b)(4)(A) merely upon the basis of findings that "the drivers and warehousemen involved were employed 'not at the construction projects but at the Otis Massey [the primary employer's] warehouse,' so that the warehouse location was the sole 'situs of the Union's dispute,' and the place where it could 'adequately publicize' its private controversy with the primary employer without disrupting work of the other neutral employers." *Id.* at 208. Although such a finding as to situs, arrived at in part by applying the same "adequate publicity" rule here proposed, brought the case within the *Moore Dry Dock* criterion barring picketing at a common situs which is not the situs of the dispute, the court said that the approval which had been given by the courts to the standards set forth in *Moore Dry Dock* for lawful picketing at a common site,

> "* * * was necessarily based upon substantial evidence that the unlawful objective denounced by the statute actually existed, rather than upon the inferentially suggested theory that this ultimate and controlling statutory in-

quiry may be effectually supplanted merely by Board findings that the real 'situs' of a labor dispute exists at a location other than that determined by the conduct of the parties, at which place alone it may be 'adequately' publicized with impunity under the Act, and thereby inferring from such findings, as here, that the unlawful objective exists. Indeed, such a theory would, we think, elevate the Board formulated 'criteria' by judicial fiat to a vantage point from which it could, in effect, circumvent the statute, for in this type instance it would substitute Board inferences as to the lawfulness or unlawfulness of an objective, based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of unlawfulness of the end or objective sought, contrary to the Supreme Court's pronouncements that it is ' "the objective of the unions' secondary activities * * * and not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision." ' International Brotherhood of Electrical Workers Local 501, v. N.L.R.B., 341 U. S. 694, 704 * * *." 225 F. 2d at 209-210.

We agree with this analysis. In this case the Board does not even press the contention that the existence of a separate situs of the primary employer causes the *Moore Dry Dock* standards to bar picketing at a common situs. Rather it seems to assert that these standards need not be con-

sidered if effective picketing can be conducted at a situs not common. Nevertheless, this difference of approach and whatever factual differences exist between *Brewery and Beverage Drivers* and this case do not render the Fifth Circuit's reasoning any less pertinent. A violation of section 8(b)(4)(A) is not to be found by a rule of decision based upon findings which are inadequate to support the conclusion reached.

Since the decision of the Board, as shown by its findings and reasoning, turns upon the fact of concerted activity at a common situs where one not common was available, we will set aside the order, notwithstanding the picketing had incidental effect upon employees of neutral employers, but will remand the case to the Board for its further consideration, if desired. Otherwise our decision would constitute an approval of a rigid rule which the language of the statute does not support.

It is so ordered.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1955

No. 12,605

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed: December 8, 1955.

(S.) JOSEPH W. STEWART,
Clerk.

On Petition for Review and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

Before: Prettyman, Bazelon and Fahy, Circuit Judges.

DECREE

This case came on to be heard on the record from the National Labor Relations Board and on the petition for review and the cross-petition for enforcement of an order of said Board, and was argued by counsel.

On Consideration Whereof, It is ordered and decreed by this Court that the order of the National Labor Relations Board on review in this case be, and it is hereby, set aside, and that this case be, and the same is hereby, remanded to the said National Labor Relations Board for its further consideration, if desired.

Dated: December 8, 1955.

Per Circuit Judge Fahy.

A true Copy,

Test: (S.) Joseph W. Stewart,
Clerk of the United States Court of Appeals, for the District of Columbia Circuit. [Seal]

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1955.

National Labor Relations Board, petitioner,

vs.

Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL.

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause

be, and the same is hereby, extended to and including March 24, 1956.

(Sgd) EARL WARREN,
Chief Justice
of the United States.

Dated this 27th day of February, 1956.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

* * * * *

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APR 21 1956
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

No. 790

October Term, 1955

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This reply is filed on behalf of respondent Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, petitioner below and respondent in the proceedings before the National Labor Relations Board which was the subject of the appeal below.

OPINION BELOW

The opinion of the Court below (Appendix A of Petition) is reported at 229 F. 2d 514 (Adv. Sheets).

JURISDICTION

The statement respecting jurisdiction is adequately set forth in the Petition herein.

QUESTIONS PRESENTED

1. In order to fit the facts of this case, the question presented herein, as set forth by petitioner (Petition, p. 2), must be supplemented as follows:

More specifically, may the Board so conclude in circumstances where the employees of the primary employer spend a major portion of their working time at the common work situs and only a minor portion at that employer's separate place of business, and the picketing was at all times properly directed against the primary employer alone, with no inducements, either at or away from the picket lines, of neutral employees to cease work other than the inducement offered by the picketing itself.

2. There is also involved in this case the question of whether there is substantial evidence in the record as a whole to support the Board's conclusion of a violation of Section 8(b)(4)(A).

STATUTE INVOLVED

In addition to Section 8(b)(4)(A) set forth in Appendix B of the Petition herein, Sections 7 and 13 of the Act, 29 U.S.C.A. 157 and 163, are directly involved in this case. These sections are as follows:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT

To the statement of this case made by the petitioner (Petition, p. 3) the following should be added:

1. The work of the drivers of the ready-mix trucks at the construction sites consisted, for the most part, of pouring the concrete mixture into forms designated and provided by the contractors, and under the direction of the construction foreman, so that when the mixture became dry it became part of the structure of the project (J.A. 10(a) and 18(a)). Thus, in substance and effect the drivers, while working at the construction site, can be considered in the same category as any other group of craft employees on a construction job, such as bricklayers, carpenters or plumbers, engaged in contributing the work of their respective trades to the completion of the project as a whole.

2. Neither in its decision below, nor in its presentation to the Court of Appeals for the District of Columbia, nor in its presentation here, does the Board make any claim that the construction sites where the concrete was poured did not harbor an area of primary labor dispute between the respondent and the primary employer where that employer was engaged in carrying on a substantial, as distinguished from a

transitory or peripheral portion of his operations. While the record is not clear as to exactly how much of this working time was spent by the drivers at each construction site in pouring concrete into forms to become part of the building structure, it might reasonably be concluded (and the Board does not attempt to deny) that this was an operation of a more substantial and of a less fleeting nature than would be, for instance, the delivery of parcels or the delivery of soft drinks to some hundreds or even thousands of delivery points, as was the situation in the *Washington Coca-Cola* case (*Brewery & Beverage Drivers* v. *N.L.R.B.*, 220 F. 2d 380).

3. While, as indicated by the petitioner in its statement, the pickets did not communicate with other workers at the construction projects, either by way of asking them to respect the picket line and refrain from working or by telling them that the picketing was not intended as an appeal to them not to work, it was further expressly stipulated between petitioner and respondent in the proceedings before the Board below that

> "Except by the display of picket signs as herein described, General Counsel [of the Board] does not contend that the respondent [Union], through its pickets, officers, or otherwise, in any manner, threatened, coerced or intimidated employees to quit work, or that any other form of inducement or encouragement of employees, whether by way of union by-laws or rules (written or unwritten), threats, promises, or otherwise, existed." (J.A. 11(a).)

4. Even assuming, although respondent vigorously denies, that the Board has authority under the Act to evaluate the legality of picketing under Section 8(b)(4)(A) by reference to the effectiveness of such picketing, the Board in its decision made no finding of fact or conclusion of law that the

picketing at the employer's separate place of business was effective.

REASONS FOR DENIAL OF THE WRIT

1. The position taken by the petitioner in this case finds no support in the Act but, on the contrary, operates to deny rights given specific protection under that Act. The meticulous opinion of the Court of Appeals below so holds and that opinion demonstrates with ample force and persuasion the entire lack of merit in the Board's position as applied to the facts of this case. It is respectfully submitted that there is no need for this Court to review that decision.

It appears to be petitioner's central assertion that since the Board must reconcile the Act's "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own" (*National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 692), the Board has a right under the Act to prescribe a rigid formula under which peaceful primary picketing is automatically outlawed at a primary place of employment where neutral employers are more likely to be affected by the picketing, if such picketing can also be "effectively" carried on at another primary place of employment where neutrals are less likely to be affected. Thus, the legality of picketing is to be determined by the following two criteria: (1) whether picketing against a primary employer is carried on both at a so-called "common situs" of employment, where the primary employer and one or more neutral employers work together, as well as at his separate premises, and (2) whether in such a situation, the picketing can be "effectively" conducted at such separate premises alone.

In support of this position, the Board makes an argument having considerable surface appeal, based on what it terms a balancing of interests and taking into consideration what it deems to be the overall equities of the situation. However, the difficulty with this argument, persuasive as it may be, is that it is a legislative one best addressed to Congress in support of an amendment permitting the Board to do what it has attempted here. As so well expounded in the unanimous decision of the Court of Appeals below, the formula which the Board seeks to utilize in this case finds no sanction in the Act as it presently stands, is at variance with the single method of determining the legality of picketing presently prescribed in the Act, and would operate both to give the Board a large measure of roving discretion not presently entrusted to it, and to deprive of rights specifically protected under the Act. Surely, any attempt to reconcile the dual Congressional objectives referred to above must be by means within the framework of the Act and consistent with both its prescribed procedures and explicitly stated protections.

At the outset it should be noted that the Act nowhere contains any reference to a "common situs", nor does it attempt to draw a distinction between the legality of primary picketing as carried on at one rather than another place of operation of a primary employer. Furthermore, the Act nowhere speaks of picketing in terms of its "effectiveness", nor does it anywhere repose a discretion in the Board to evaluate the legality of picketing in terms of its adequacy at one rather than at another place of primary employment. This is as might be expected; the outcries which preceded and have followed passage of the Taft-Hartley Act in 1947 would have been as children's whispers compared to the outcries which would have accompanied any attempt by Congress to grant an administrative branch of the Government power to judge

and determine the validity of picketing by reference to an appraisal of how effectively it can be conducted.

The foregoing observations are equally true of the legislative history of the Act; nowhere in that legislative history is there mention made of the term "common situs" or a similar one, nor is there any discussion concerning the type of situation exemplified by the present case, nor is there indicated any intention on the part of Congress to outlaw picketing against a primary employer, if otherwise properly conducted and directed, merely because it is carried on at a place where other employers also conduct their operations. Thus, there can be found no support whatsoever either in the language of the Act or in its legislative history for the Board's attempt in the present case to proscribe picketing by reference to a "common situs" and "ability to picket effectively elsewhere" formula.

On the contrary, the Act sets forth just one type of picketing which is illegal under Section 8(b)(4)(A)—all other striking and picketing activities are expressly preserved—and the Board is limited to one approach in ascertaining whether violations of 8(b)(4)(A) have taken place. Section 8(b)(4)(A) proscribes picketing for the purpose of inducing employees to cease work only where "an object thereof is . . . forcing or requiring . . . any employer to cease doing business . . . with any other person". Thus, the test of unlawfulness set forth in the Act has reference solely to the objective of the picketing, and it is only by proof of the proscribed objective that picketing can be condemned. See, e.g., this Court in *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U. S. 675, at 687, where it is stated "We must first determine whether the strike in this case had a proscribed object", and in *I.B.E.W. v. N.L.R.B.*, 341 U. S. 694, at 704, where it is stated:

> ". . . 'It was the *objective* of the union's secondary activities . . . and not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision. . . ."

It is, therefore, the sole function of the Board to determine from the available evidence whether in each case the picketing in question was carried on for the proscribed object. This is far different from a roving commission to inquire into the effectiveness of picketing on the one hand and, on the other, to use a rigid situs formula of illegality as substitute for such proof. Indeed, far from the Act's granting any such commission or right, Congress made certain that traditional acts of striking and picketing against a primary employer were to be left undisturbed. Section 7 of the Wagner Act which gave original protection to these rights was retained verbatim in Taft-Hartley except only that there was added the right to refrain from the guaranteed concerted activities.[1] In addition, Section 13 of the Act requires that the Act be construed so as not "either to interfere with, impede, or diminish in any way the right to strike", except as may be specifically provided for in the Act, and, as we have seen, there is no provision in the Act, specific or otherwise, which in any way contemplates or countenances interference with the right of primary picketing in the manner which the Board has attempted in the present case. As stated by this Court in *Rice Milling (N.L.R.B. v. International Rice Milling Co.*, 341 U. S. 665, at 673):

> "That Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike has been indicated recently by this Court. . . .

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[1] Section 7 which guarantees the right of "concerted activities for . . . mutual aid or potection" has long been held to include the right to strike and picketin support of economic demands. **N.L.R.B. v. Mackay Radio, etc.**, 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938), and **Collins Baking O. v. N.L.R.B.** 193 F. 2d 483 (C.A. 5, 1951).

> "By 13, Congress has made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede, or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specifically provided for' in the Act. No such specific provision in § 8(b)(4) reaches the incident here."[2]

Examination of the legislative history of the Act further discloses that Congress had no intention of proscribing traditional striking and picketing activities of labor organizations directed against employers with whom the union had a legitimate primary dispute; even the most fervent Congressional advocate of anti-union amendments to the Wagner Act during the period preceding Taft-Hartley did not urge outright prohibition of such fundamental rights because of their exercise at a place where both the primary employer and other neutrals were engaged in business. Thus both the language of the Act and its legislative history indicate conclusively that Congress intended to preserve, not destroy, the right of picketing against a primary employer involved in a primary labor dispute. "For the policy of the National Labor Relations Act is not to condemn all picketing but only that ascertained by its prescribed process to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing". *Garner v. Teamsters Union*, 74 S. Ct. 161, 346 U. S. 485, 98 L. Ed 228 (1954).

The starting point, then, in assessing 8(b)(4) violations in a common situs situation, is not, as proposed by the Board,

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[2] Although the reference in the decision is to "the ordinary strike", the Supreme Court obviously equated ordinary picketing with the ordinary strike, because, in **Rice Milling**, none of the employees of the employer against whom the picketing was directed engaged in the strike or in the picketing and, indeed, none were members of or sympathetic to the union. The "strike" actually was picketing for recognition or organizational purposes and consisted solely of picketing by members of the union who were not employees of the struck employer.

whether there is a separate primary place of employment where picketing can be effectively conducted, but rather whether at the common situs employees of the primary employer are engaged in a substantial manner, not transitorily or peripherally, in carrying on normal business operations of the primary employer. If so, then under the Act there is a right to picket the primary employer at that situs, unless it can be affirmatively shown under all of the circumstances by competent proof other than the act of picketing standing alone that a direct object is deliberate involvement of third party employees. The fact that other employees of other employers may also be employed at a particular site may make it necessary to take precautions against involvement [3] as by properly directed picket signs *(cf. I.B.E.W., Local 501,* 341 U. S. 694), but the fact of common employment does not *ipso facto* require, as the Board has here required, relinquishment of that right. That right is too fundamental and too important a one, embracing not only Sections 7 and 13 protections but also elements of free speech [4], to permit its denial unless clear proof of unlawful object is present. To use the exercise of the right as evidence of the illegality of object is to play fast and loose with the protections of the Act as well as those of the First Amendment.

It may well be that the incidental effect of picketing in this case, as indeed of any picketing, is to induce union sympathizers to refrain from crossing the picket line. But until this case the Board has not used such incidental effect as proof of

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[3] This duty to take precautions does not require that the pickets inform neutral employees that the picketing was not intended as an appeal to them. **Painters & Paperhangers (Pittsburgh Plate Glass Co.),** 110 NLRB No. 84.

[4] **Thornhill v. Alabama,** 310 U.S. 88; **American Federation of Labor v. Swing,** 312 U.S. 321.

unlawful object. On the contrary, the Board [5] and the courts [6] have directly repudiated the "incidental effect" argument on the ground that under it all primary concerted activity could immediately be outlawed, just as it could under the "everybody knows the effect of picketing" argument suggested by the Fourth Circuit in the *Stover Steel* case (*Piezonki v. N.L.R.B.*, 291 F. 2d 879, at 881).

2. The conclusion of the Board that the picketing which is proscribed herein was for an object made illegal under the Act is unsupported by any substantial evidence in the record considered as a whole.

Petitioner argues that since the respondent union had adequate opportunity to picket effectively at a place other than the construction or the common situs of employment, it is a fair conclusion, from the act of picketing at the construction site in itself, that the motive in so picketing was to involve employees of third party contractors. But why and on what premise can such conclusion be deemed a fair one? Is it not just as fair and certainly a more natural conclusion that the object of such picketing was the simple, obvious and traditional one of reaching Campbell's employees where most appropriate, i.e., where they perform substantial services for their employer. Certainly, picketing against Campbell would be greatly more effective if carried on where Campbell's drivers spend the major portion of their time rather than at the two plants where the drivers, coming and going as they do, are much less accessible and are present only 25% of the working day. The Building Trades cases in this Court [7] teach,

[5] Pure Oil, 84 NLRB 315; Ryan Construction Co., 85 NLRB 317.

[6] N.L.R.B. v. Service Trade Chauffeurs, Inc., 191 F. 2d 65 (C.A. 2, 1954); N.L.R.B. v. Local Union 55, 218 F. 2d 226 (C.A. 10, 1954).

[7] N.L.R.B. v. Denver Building and Construction Trades Council, 341 U. S. 675; International Brotherhood of Electrical Workers, Local 501, AFL, v. N.L.R.B., 341 U. S. 694; United Brotherhood of Carpenters and Joiners of America, AFL, v. N.L.R.B., 341 U. S. 707.

as we have seen, that the mere fact of common employment does not render properly directed picketing illegal. Here there is not a scintilla of supporting evidence, such as improperly directed picket signs, personal solicitations, connivance with other building trades unions, or the like, to bear out the Board's assumption of an unlawful object. It must be remembered that the stipulation between the parties herein makes clear that no "form of inducement or encouragement of employees, whether by way of union by-laws or rules (written or unwritten), threats, promises or otherwise" other than the mere display of the properly directed picket signs operated to induce employees of neutrals to quit work.

The Board's reasoning in this matter, utilizing as it does the exercise of a Section 7 right alone as proof of an object illegal under Section 8(b)(4), would dispense entirely with the Board's burden of proof in 8(b)(4) cases. "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice." *N.L.R.B. v. Houston Chronicle Publishing Co.*, 211 F. 2d 848, 854 (C. A. 5, 1954). If the Board's reasoning is permitted to stand, there would be afforded an easy method of convicting of 8(b)(4) violations out of hand in respect to any picketing which evokes a response from employees of third parties. Surely, such a result was not intended by Congress.

This entire argument of the Board, under which it concludes an improper motive from the mere act of picketing at the common situs, even though the primary employer may be substantially engaged in business at that situs, and under which it assumes to evaluate the effectiveness of picketing, forgets that the right to picket, as traditionally conceived and carried on by unions, involves the right to picket wherever an employer with whom a dispute exists is carrying on his

normal activities and where his employees are working for him in other than a transitory manner. Picketing a primary employer in a labor dispute, to be truly effective, must necessarily carry with it the right to picket that employer in all his places of operation; any other rule could well render meaningless the exercise of that important right. For instance, in the present case, by what warrant can the Board conclude (although in its decision it did not expressly so find) that the picketing at the Campbell plants, where the employees report in and out and spend only 25 per cent of their time, is effective? For all we know or for all the record discloses, the plants may be so located, as in an isolated area, or their accessibility be such as to make picketing at the plants completely ineffective.

It is submitted that the Board has not only failed to assume its burden of proving an illegal object in the picketing here by substantial evidence, but has even failed to adduce proof in support of its own theory of effective picketing elsewhere. Certainly, no useful purpose can be served by review of this case on the basis of a record such as the present one.

3. The precise issue here involved has already been determined by this Court adversely to petitioner in *N.L.R.B. v. General Drivers, Warehousemen & Helpers Local 968*, No. 476, October Term 1955, certiorari denied, 350 U. S. 914, December 5, 1955. There, as indicated by the Board in its petition herein (p. 6), the broad question of the right of the Board to conclude that the mere extension of picketing to another place of operation of a primary employer where neutral employers are also at work constituted a violation of Section 8(b) (4) (A) was presented to this Court, and this Court declined review. If anything, the picketing in the present case, even more than the picketing in the Local 968 case above, is entitled to protection, for here the very employees

over whom the dispute existed were engaged in work at both places of employment rather, as in the Local 968 case, only at the primary employer's separate place of business.

The case of *N.L.R.B. v. Truck Drivers & Helpers Local No. 728*, 228 F. 2d 791 (CA 5, Jan. 17, 1956), which the petitioner asserts is in conflict with the decision of the Court below, is distinguishable on the ground that in that case, unlike the situation in the present case, the picketing did not disclose "clearly" that the dispute was with the primary employer. Similarly, the decision of the Second Circuit in *N.L.R.B. v. Associated Musicians of Greater New York, Local 802*, 226 F. 2d 900 (Nov. 3, 1955), is distinguishable upon the grounds set forth in f.n. 2 of the decision below (Petition, p. 22).

CONCLUSION

It is respectfully submitted that the formula of illegality of picketing under Section 8(b)(4)(A) of the Act utilized by the Board in this case, under which by rote it classifies all common situs picketing illegal where picketing can also be "effectively" carried on at another separate place of employment, is not sanctioned by the Act, and constitutes an abandonment by the Board of its function and duty both to protect Section 7 rights and to determine in each case, on the basis of substantial evidence, that an actual—not an incidental—object of the picketing is to involve third party neutrals. The Petition herein should be dismissed.

Respectfully submitted,

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